IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

State of Washington
Appellant

v.

JESUS MIGUEL VILLARREAL
Respondent

42315-4-II

On Appeal from the Cowlitz County Superior Court

Cause No. 10-1-00476-6

The Honorable Michael H. Evans

APPELLANT'S BRIEF

Jordan B. McCabe, WSBA # 27211
For Appellant, Jesus M. Villarreal

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II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error.

1. The suppression court erroneously failed to suppress evidence obtained in violation of the Fourth Amendment and Wash. Const. art. 1, § 7.

2. The suppression court committed structural error by conducting the CrR 3.6 hearing without benefit of the Rules of Evidence.

3. The failure to produce an eye-witness whose dispositive testimonial hearsay was misrepresented at the suppression hearing violated *Crawford* and abrogated his U.S. and state constitutional confrontation rights.

4. The evidence was insufficient to prove possession with intent to deliver.

5. The trial court erroneously admitted irrelevant expert testimony contrary to ER 702.

6. The school-zone sentencing enhancement statute, RCW 69.50.435(a), is unconstitutional as applied.

7. The prosecutor committed reversible misconduct in closing argument.

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B. Issues Pertaining to Assignments of Error.

1 Appellant's seizure did not constitute a lawful *Terry* stop.

(a) The State introduced no evidence that would support an articulable suspicion that Appellant had committed any crime prior to the stop.

(b) The State introduced no evidence that would support an articulable suspicion that the bag he was carrying was stolen.

2. The warrantless search of Appellant's bag was not justified by any exception to the warrant requirement.

(a) The police had no lawful reason investigate Appellant's bag.

(b) Appellant's consent to search the bag was invalid because no intervening event purged the taint of the unlawful stop.

3. Conducting a CrR 3.6 hearing without Rules of Evidence is a structural error because such a proceeding cannot produce a reliable result.

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4. The State failed to establish sufficient evidence of intent to deliver beyond the quantity of drugs.

5. Failure to produce an essential eye witness at the CrR 3.6 hearing and relying instead on hearsay violated *Crawford.*

6. The evidence was insufficient to support a conviction for intent to deliver.

7. Appellant was prejudiced by the erroneous admission of expert testimony

8. The school zone enhancement, RCW 69.50.435(d), is unconstitutional as applied, because it permits arbitrary enforcement.

9. The prosecutor obscured the presumption of innocence in closing argument.

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III. SUMMARY OF THE CASE:

Appellant, Jesus Miguel Villarreal, appeals his conviction for possession of methamphetamine with intent to deliver in a school zone in violation of RCW 69.50.401(1) and RCW 69.50.435(1)(d). CP 1.

In the early hours of March 25, 2010, Mr. Villarreal and a female friend approached a vehicle parked in front of a house in Kelso where some hours earlier the police had carried out a controlled drug buy. Using a key, Villarreal retrieved his bag from the vehicle, relocked it, and walked away with his friend in the direction of her nearby home. A couple of blocks away, he was stopped, seized, and questioned by Cowlitz County police officers. The police searched Mr. Villarreal's bag and found methamphetamine. Villarreal was arrested and charged with possession with intent to deliver in a school zone.

Villarreal moved to suppress the evidence, claiming the police violated Washington Constitution article I, section 7 and the Fourth Amendment. The State defended the stop as lawful under *Terry*,[1] because of Mr. Villarreal's recent proximity to the scene of known criminal activity. The arresting officer also claimed he suspected that Villarreal's bag might be stolen.

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[1] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

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The court denied his motion and a jury found him guilty. He received a standard range sentence plus a school zone enhancement of nine years. CP 46.

On appeal, Villarreal challenges the suppression court's denial of his motion to suppress the contents of his bag, challenges the sufficiency of the evidence of intent to deliver. and claims the school zone enhancement statute is unconstitutional as applied to these facts.

IV. STATEMENT OF THE CASE

Jesus M. Villarreal moved to suppress the physical evidence offered by the State in his prosecution for possession of methamphetamine with intent to deliver. CP 7. The court conducted a CrR 3.6 hearing, at which the following facts were presented.

Police suspected Victoria Ortega-Barrera, a woman unconnected with Mr. Villarreal, of dealing drugs from her residence at 99 Home Court, in Kelso, Washington. During the evening of March 24, 2010, narcotics officers made a controlled buy inside Ortega-Barrera's home. RP 3. Then, following their standard procedure, the police delayed seeking a search warrant for several hours while they kept the premises

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under surveillance, ostensibly to prevent potential evidence inside the home from being disturbed or removed.[2] RP 6-7.

Earlier that day, Mr. Villarreal, an auto mechanic, had been working on a vehicle in the driveway in front of Ortega-Barrera's home. RP 44. In the early hours of March 25, accompanied by Holly West, a friend who lived nearby, Villarreal returned to retrieve a computer bag he had left locked in the vehicle. RP 45. Then under continuous surveillance by plain-clothes officers, Villarreal and West left on foot to return to Ms. West's nearby residence. After two blocks, near the corner Barnes and First Street, they were stopped by officers in a police cruiser. RP 14, 23, 25.

Police Sergeant Kevin Tate had returned to the Kelso police station after supervising the earlier controlled drug buy inside the Ortega-Barrera home. RP 5, 8. Tate testified that an unidentified officer radioed the station to report that a person, possibly male, had been seen leaving the Ortega-Barrera property after removing something from a vehicle in the driveway. Tate received this information at the police station, so had no personal knowledge of Villarreal's approach and departure. RP 9.

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[2] The explanation for extending surveillance instead of simply executing warrants was unintelligible: It was "to ensure... what is going on between the time of the observed activity specific to the investigation. And then any further law enforcement action in the situation at hand involving the defendant, Mr. Villarreal, seated at the defense table, all of that involvement related to the 99 Home Court address." RP 5.

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Defense counsel did not object to Tate's hearsay testimony on the understanding that Longview Police Officer Kevin Sawyer would testify from personal knowledge. RP 10.

But Sawyer testified that he never came close to Ortega-Barrera's house. RP 21. He was involved elsewhere in other aspects of the Ortega-Barrera investigation. RP 13. In fact, he was at the Kelso police station when Tate instructed him to put on his uniform, collect his K-9 dog, and go contact "a suspect." RP 14. Thus, Sawyer's testimony was hearsay one step further removed than Sergeant Tate's. All Sawyer knew was that an unnamed surveillance officer told Tate that a lone, possibly male individual had been seen leaving the vicinity of the target premises on foot. RP 13, 22.

The trial court was under the impression that the Rules of Evidence did not apply to suppression proceedings. RP 10. In its bench ruling, however, the court recognized that the State had not met its burden of establishing that Villarreal was ever inside the house. "The defendant is seen leaving the house or driveway, it is not clear which[.]" RP 58.

Mr. Villarreal and Ms. West both testified that two uniformed officers from the police car conducted the stop while an officer in street clothes watched from across the street. RP 32, 48. Officer Sawyer

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corroborated that at least three officers, himself and two others, participated in the stop. RP 24.

The prosecutor unequivocally conceded that Mr. Villarreal was seized from the outset of this encounter with the officers. The prosecutor further conceded that the purpose of the stop was "because of a necessity to the investigation[.]" RP 53.

Villarreal and West both said they stopped in response to the blue flashing lights, which they recognized as an order to stop. RP 34-35, 45, 47. The suppression court rejected their testimony, however, citing unspecified inconsistencies. RP 59. Instead, the court believed Officer Sawyer's story that, after receiving the order from Tate to contact "a suspect," he put on his uniform, collected his dog, checked out a patrol car, and drove from the police station to Barnes and First Avenue — all in the time it took Villarreal and West to walk two blocks. RP 13-14, 21, 25.[3]

When Sawyer was close enough to "see the whites" of Villarreal's eyes, Villarreal put down his bag and moved way from it. RP 14. Sawyer immediately activated his blue flashing lights, pulled alongside Mr. Villarreal and Ms. West, and ordered them to stop. RP 14. The couple

[3] Sawyer gave a different account at trial. RP 94-95. Only substantial evidence presented at the suppression hearing, however, is pertinent to the suppression court's ruling. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

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complied. Sawyer stated under oath that he was suspicious that Villarreal may have stolen the bag. RP 17.

Sawyer asked Villarreal for identification. He was not carrying any, but gave his true name and date of birth. Sawyer called these in to dispatch and learned that Villarreal had an outstanding misdemeanor warrant. RP 48.

Sawyer interrogated Villarreal about the bag, and Villarreal said it belonged to him and that he had not stolen it. RP 18. Sawyer testified that he then asked if he could look in the bag and that Villarreal freely consented. RP 19. The judge noted the implausibility of this testimony, but nevertheless believed it. RP 59-60. Mr. Villarreal and Ms. West both testified that the police did not ask for consent to search, but that a second officer grabbed the bag and started rifling through it while Sawyer was questioning Villarreal. RP 48.

The bag contained approximately 30 grams of methamphetamine in three plastic baggies. RP 19, 124.

Mr. Villarreal was Mirandized and arrested. RP 19, 36. While he was being taken into custody, he said he was a drug addict, and that the meth was solely for his personal use. RP 19.

He was convicted by jury of one count of possession of methamphetamine with the intent to deliver. CP 39. Because the police

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elected to seize him within 1,000 yards of a school, Villarreal was subjected to a nine-year sentencing enhancement. CP 46. He filed this timely appeal. CP 57.

V. ARGUMENT

1. THE POLICE LACKED ARTICULABLE GROUNDS TO CONDUCT A LAWFUL TERRY STOP.

Villarreal Was Seized: As a preliminary matter, the State conceded during the CrR 3.6 hearing that Officer Sawyer seized Mr. Villarreal. The only disputed fact was whether the seizure occurred when Sawyer activated his emergency lights, or when he pulled alongside and ordered Villarreal to stop. It is well established that activating emergency lights constitutes a seizure. *See, e.g., State v. DeArman*, 54 Wn. App. 621, 624, 774 P.2d 1247 (1989) (activating emergency lights and high beams to summon the occupants of a parked vehicle is a sufficient show of force to constitute a seizure, quoting *State v. Stroud*, 30 Wn. App. 392, 396, 634 P.2d 316 (1981), *review denied*, 96 Wn.2d 1025 (1982). Villarreal

No Articulable Suspicion of Criminal Activity: The Fourth Amendment to the United States Constitution protects against unlawful search and seizure.[4] Article I, section 7 of the Washington Constitution

[4] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall

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protects against unwarranted government intrusions into private affairs.[5] These protections mandate that all evidence derived from unlawful government activity must be excluded from our courts for all purposes. *State v. Chenoweth*, 160 Wn.2d 454, 473, 158 P.3d 595 (2007); *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Warrantless seizures are per se unreasonable, and the State bears the burden of demonstrating that a warrantless seizure falls into a narrow exception to the rule. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). These exceptions are "'jealously and carefully drawn.'" *Id.*, quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979). Washington's search and seizure protections are even more rigorous than those of the Fourth Amendment. *State v. Winterstein*, 167 Wn.2d 620, 632, 220 P.3d 1226 (2009).

One such exception is for the brief investigatory seizure known as the *Terry* stop, the prerequisites for which are well established. A *Terry* stop requires that the police officer who conducts the stop must have a well-founded suspicion that the defendant has engaged in criminal

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issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

[5] "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7.

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conduct. *Terry*, 392 U.S. at 21; *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). The test is not that the officer have articulable grounds to suspect that "a crime has occurred." Rather, the Fourth Amendment and art. I, § 7 require the State to show by clear and convincing evidence that the stop was justified. *Garvin*, 166 Wn.2d at 250. This means the officer must have individualized suspicion that the subject of the stop has committed a crime.

Here, a brief stop in the driveway of a house where drugs had been sold hours earlier is insufficient to establish grounds for a *Terry* stop and search. Even a visit inside a suspected drug house is insufficient, without more, to constitute articulable suspicion. *State v. Doughty*, 170 Wn.2d 57, 60, 239 P.3d 573, 574 (2010). Neither does a person's "mere proximity to others independently suspected of criminal activity" justify a stop. *Doughty*, 170 Wn.2d at 62.

Doughty is dispositive in this case. Doughty engaged in conduct far more questionable than Villarreal's: He went into a known drug house at 3:20 a.m., stayed less than two minutes, then returned to his car and drove away. *Doughty*, 170 Wn.2d at 60. Doughty's actions were not sufficient to subject him to a warrantless search and seizure. *Id.* at 62.

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Officer Sawyer testified that one reason for stopping Mr. Villarreal was a suspicion that the bag he was carrying might be stolen. This professed reason for stopping Villarreal and West was clearly pretextual.

When determining whether a particular intrusion is pretextual, the Court considers the totality of the circumstances, including the subjective intent of the officer as well as the objective reasonableness of the officer's conduct. *Id.* at 358-59. Here, it was undisputed that Sawyer's subjective intent was to stop and search Villarreal as a suspect in the investigation of the Ortega-Barrera house. These were the express instructions Sawyer received from Sergeant Tate.

The only objective facts available to Sawyer were that Villarreal was spotted leaving the vicinity of a suspected drug house at two in the morning. This did not constitute grounds to suspect him of criminal activity. Moreover, it makes no difference whether Villarreal put down his bag before, during, or after Sawyer's signaling him to stop with flashing blue lights. The uncontradicted testimony of both Sawyer and Tate was that the decision to seize and investigate Villarreal had been made at the Kelso police station before Sawyer even got into his uniform. The prosecutor unambiguously conceded this in closing argument. RP 53. (Villarreal was seized "because of a necessity to the investigation[.]")

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Suppression is the Sole Remedy: When the State obtains evidence in a manner that constitutes an unreasonable search or seizure, the evidence is fruit of the poisonous tree. *Wong Sun*, 371 U.S. at 487-88. The sole remedy is to suppress. *Doughty*, 170 Wn.2d at 65.

The State had no evidence against Mr. Villarreal that was lawfully obtained. Insufficient evidence requires dismissal with prejudice as a matter of law. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). The Court should reverse this conviction, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

2. OFFICER SAWYER'S ALLEGED SUSPICION THAT VILLARREAL'S BAG WAS STOLEN WAS PRETEXTUAL.

When a police officer invades an individual's privacy, not to enforce the law but to conduct an unrelated criminal investigation, the intrusion is a pretext. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). Pretextual stops and searches violate art.1, §7, because they are without the 'authority of law' that a warrant would bring. *Id.* at 358-59. *Terry* strictly prohibits even a limited search on the basis of "inchoate and unparticularized suspicion." *Terry*, 392 U.S. at 27.

When reviewing the denial of a suppression motion, the Court examines the trial court's findings of fact for substantial evidence and

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determines the findings support the court's conclusions of law. *State v. Lohr*, ___ Wn. App. ___, ___ P.3d ___, (2011), WL 4944297, Slip Op. at 2. Here, the record contains no written findings and conclusions required by CrR 3.6.

Officer Sawyer testified under oath that his reason for searching Villareal's bag was no more than an inchoate suspicion that it might be stolen. But the mere fact that Villarreal put the bag down as the police closed in on him did not create grounds for reasonable suspicion. *See State v. Worth*, 37 Wn. App. 889, 893, 683 P.2d 622 (1984) (unlawful to seize personal effects obviously in a person's control); *Lohr*, Slip Op. at 2. Sawyer testified that, as in *Worth*, Mr. Villarreal unambiguously asserted that the bag belonged to him. RP18. The bag was clearly associated with him. "We do not believe that the purpose of the Fourth Amendment is furthered by making its application hinge on whether an individual happens to be holding or wearing such a personal item as a purse when a search is under way." *Lohr*, Slip Op. at 4

Moreover, Sawyer's purported suspicion was manifestly pretextual. Sawyer himself testified that Sgt. Tate had directed him to seize and investigate Villarreal as part of the investigation of the recent Ortega-Barrera drug buy. Tate also testified that he instructed Sawyer to apprehend Villarreal as a suspect.

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Sawyer was indisputably conducting an investigation of criminal conduct unrelated to anything he personally observed during the seizure of Villarreal. This is precisely the sort of violation of individual privacy that art. 1, § 7 prohibits. The judge erred by failing to suppress the evidence.

3. NO INTERVENING EVENT PURGED THE TAINT OF VILLARREAL'S CONSENT TO SEARCH THE BAG.

The trial court accepted Officer Sawyer's testimony that, as implausible as it seemed, Mr. Villarreal freely consented to the search of his bag. RP 59. Based on this finding, the court concluded that Villarreal's consent defeated his motion to suppress as a matter of law. This was error.

The general rule is that consent to a search constitutes one of the recognized exceptions to the warrant requirement. *Ladson*, 138 Wn.2d at 349. However, consent is invalid where the initial stop was unlawful unless some event intervenes between the detention and the search that is sufficient to purge the taint of the unlawful stop. *State v. Tijerina*, 61 Wn. App. 626, 630, 811 P.2d 241 (1991), citing *Taylor v. Alabama*, 457 U.S. 687, 690, 102 S. Ct. 2664, 73 L. Ed. 2d 314 (1982).

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Here, as in *Tijerina*, the police had no lawful grounds to interfere with Mr. Villarreal, and nothing happened between the stop and the search to purge the taint.

The evidence obtained pursuant to the unlawful stop and search must be suppressed.

4. THE TRIAL COURT COMMITTED STRUCTURAL ERROR BY CONDUCTING A CrR 3.6 HEARING WITHOUT APPLYING THE RULES OF EVIDENCE.

During a discussion about the admissibility of second-and third-hand hearsay, the suppression court erroneously ruled that the Rules of Evidence did not apply. That is, the trial court believed it could adjudicate Mr. Villarreal's challenge to the violation of his rights under the Fourth Amendment and Wash. Const. art. I, § 7 based on triple hearsay: what Officer Sawyer said Sergeant Tate said some unidentified individual said to him based on we know not what.[6] This was reversible error.

Moreover, an error is structural when it renders a criminal proceeding "fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Structural errors include "things like relieving the State of its burden of proof." *State v. Grenning*, 169 Wn.

[6] No witness testified from personal knowledge, and we know the report that Villarreal was observed leaving the house was false. RP 81-82. (Please see Issue 5 at page 17.)

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2d 47, 60 n. 11, 234 P.3d 169 (2010). Throwing out the Rules of Evidence at a suppression hearing is such a thing. It constitutes structural error and requires automatic reversal. *State v. Strode*, 167 Wn.2d 222, 231, 217 P.3d 310 (2009).

The purpose of the Rules of Evidence is to secure fairness and to ensure that truth is justly determined. ER101; *State v. Wade*, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). It is essential that a motion to suppress evidence obtained in violation of a citizen's fundamental constitutional rights is a procedure at which justly determining fairness and truth is essential.

The purpose of a CrR 3.6 hearing is not to resolve a preliminary question of fact for the purpose of applying a rule of evidence. Rather, it is constitutionally-required evidentiary hearing whereby the judge is required to make findings of fact based upon substantial evidence upon which to base conclusions of law on the defendant's claim that his constitutional rights have been violated. The judge here may erroneously have believed that ER 1101(c), the rule that permits preliminary determinations of fact preparatory to ruling on the admissibility of substantive evidence under 104(a), applied to a CrR 3.6 motion. But a challenge to the admissibility of evidence seized in violation of the United

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States and Washington Constitutions rises above a preliminary fact question under rule 104(a).

A comparable example is ER 6.4(d)(2), which applies the rules of evidence to a challenge to excluding a juror. *See In re Stockwell*, 160 Wn. App. 172, 181, 248 P.3d 576, 580 (2011). But a CrR 3.6 evidentiary hearing cannot be characterized as a determination of preliminary questions of fact to which the Rules of Evidence do not apply. Triple hearsay cannot be deemed "substantial" evidence.

A preliminary determination of fact is what the court does to decide whether the actual trier of fact may hear the evidence. The suppression court, by contrast, is functioning as "an actual trier of fact." *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

This Court regards the issue of unlawful search or seizure as a manifest constitutional error of sufficient magnitude to be reviewable for the first time on appeal. *State v. Harris*, 154 Wn. App. 87, 94, 224 P.3d 830 (2010). On appeal, challenged CrR 3.6 findings are reviewed for substantial evidence. *Hill*, 123 Wn.2d at 647. And substantial evidence does not exist unless there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *State v. Maxfield*, 125 Wn.2d 378, 385, 886 P.2d 123 (1994). A trial court's ruling on a preliminary question of fact, by contrast, is not reviewable,

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even if it is raised below. The party would have to assign error to the evidentiary ruling based on the alleged erroneous preliminary ruling.

Because the error is structural, even without proof of actual prejudice, conducting a hearing on a meritorious suppression motion without reference to the Rules of Evidence is a structural error that requires reversal.

5. DENYING A SUPPRESSION MOTION WITHOUT TESTIMONY BY THE STATE'S SOLE EYE-WITNESS TO THE CONDUCT ALLEGEDLY JUSTIFYING A STOP VIOLATED *CRAWFORD* AND THE SIXTH AMENDMENT CONFRONTATION CLAUSE.

Only one State's witness claimed to have actually seen Villarreal when he came to collect his bag. That was DOC Community Corrections Officer Dustin Pratt. RP 80. At the trial, Officer Pratt testified that while he was engaged in surveillance of the Ortega-Barrera residence, he "watched somebody go into a car and leave, and [he] radioed that somebody had taken a bag out of a car and ... walked away from that car." RP 81-82. Pratt testified that the person may have approached the residence, but nobody appeared to be home, so the person walked away. RP 82. The information reported by Pratt was simply that someone had removed something from a car in the driveway and walked away with it. RP 83.

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The State did not produce Officer Pratt at the CrR 3.6 hearing, however. RP 10. Instead, the State relied on second- and third-hand reports from Officers Tate and Sawyer, who garbled the report by Pratt that would have established that Villarreal did not enter the house but merely engaged in innocuous conduct in the driveway. At trial, Sawyer conceded that when he said Villarreal had been seen leaving the Ortega-Barrera house, what he really meant was that he had been seen leaving the driveway, not the house itself. RP 111. Without Pratt, Sawyer and Tate effectively obscured this crucial fact at the CrR 3.6 hearing.

The federal and state Constitutions both guarantee the right of accused persons to confront the witnesses against them. U.S. Const. amend VI; Wash. Const. art. I, § 22; *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The most important component of this right is the right to conduct a meaningful cross-examination of adverse witnesses. *Darden*, 145 Wn.2d at 620.

The confrontation clauses exclude testimonial statements from criminal trials unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). "Testimonial" simply means the declarant would reasonably expect his statements to be used prosecutorially. *Crawford*, 541 U.S. at 52. The erroneous admission

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of testimonial hearsay requires the Court to reverse unless the error was harmless beyond a reasonable doubt. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005).

Addressing the same issue in *State v. Fortun-Cebada*, 158 Wn. App. 158, 241 P.3d 800 (2010), Division I relied on *McCray v. Illinois*, 386 U.S. 300, 311–13, 87 S. Ct. 1056, 18 L. Ed. 2d 62 (1967), which addressed the confrontation clause implications of withholding the name of an informant at pretrial proceedings. The Court found no Sixth Amendment violation because "the asserted interference with cross-examination did not occur at trial.") *Fortun-Cebada*, 158 Wn. App. at 172-173. That is to say, the confrontation violation did not occur at the proceeding at which it was relevant.

Villarreal's case is distinguishable. Cross-examining this vital suppression witnesses at trial was of no use to his defense whatsoever. The suppression challenge was dispositive of the outcome of the entire prosecution. Therefore, the suppression hearing, not the trial, was the relevant proceeding at which Mr. Villarreal's right to confront and cross-examine adverse witnesses was meaningful.

The court committed reversible error by denying Mr. Villarreal's constitutional challenge to the admission of the methamphetamine, without which the prosecution could not proceed, based solely on multiple

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hearsay that originated with a witness who did not testify. This error prejudiced Villarreal. Had Pratt testified at the CrR 3.6 and been subject to cross examination, the evidence would have been suppressed, because *Terry* requires articulable suspicion based on objective facts that a suspect has engaged in individualized criminal conduct and was not merely in the vicinity of a suspected drug house. The court would have suppressed all the State's evidence if Pratt had testified.

Reversal is required. *Crawford*, 541 U.S. at 76.

6. THE EVIDENCE OF INTENT TO DELIVER IS INSUFFICIENT TO SUSTAIN THE VERDICT.

In reviewing a challenge to the sufficiency of the evidence, the Court views the evidence in the light most favorable to the State and decides whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In determining whether the necessary quantum of proof exists, the Court need not be convinced of the defendant's guilt beyond a reasonable doubt, so long as it is convinced that substantial evidence supports the State's case. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303, *review*

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denied, 119 Wn.2d 1003 (1992). But the State must present enough evidence to allow the jury to find each element beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). Evidence based on guess, speculation, or conjecture does not constitute substantial evidence. *State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817 (2001).

To convict for possession of a controlled substance with intent to deliver under RCW 69.50.401(1), the State must prove the essential element of intent to deliver. *State v. O'Connor*, 155 Wn. App. 282, 290, 229 P.3d 880 (2010). Mere possession of a controlled substance, including quantities greater than needed for personal use, is not sufficient to support an inference of intent to deliver. *State v. Hagler*, 74 Wn. App. 232, 235-36, 872 P.2d 85 (1994). There is no intent to deliver as a matter of law unless the evidence shows both possession and additional facts suggestive of a sale. *Hagler*, 74 Wn. App. at 236; *State v. Brown*, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993). Examples of corroborating evidence sufficient to suggest a sale include scales, cell phones, address lists, large amounts of cash, packaging material, and similar items of delivery paraphernalia. *See, e.g., State v. Slighte*, 157 Wn. App. 618, 627, note 13, 238 P.3d 83 (2010).

The record suggests that the jury most likely based its finding that Villarreal intended to sell the meth in his possession most likely was based

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on the quantity of substance. A police expert testified that people who buy an eighth of an ounce (3.4 grams) or more of methamphetamine generally do so for resale. RP 161-62. Villarreal had close to 30 grams. RP 124. But, according to State's witness Timothy Watson, the average user ingested one half to one gram of methamphetamine per day. RP 171. So a so-called "eight-ball," at just over 3 grams, is only a three-day supply. RP 179. Thus, even according to the State's expert, Villarreal possessed only enough meth for about one month's personal use. RP 185. And Villarreal testified that he used at three times the average amount. RP 185. There was testimony that buying in bulk increased the dollar savings and reduced the risk of prosecution. RP 174, 188. Moreover, as a matter of law, the quantity possessed is an unreliable predictor of what the possessor intends to do with it. *Hagler*, 74 Wn. App. at 235-36.

But the police found no scales, incriminating cell phone evidence or other client logs, packaging material, or any sort of delivery-associated paraphernalia whatsoever. Over a defense objection, the court admitted evidence that Villarreal was carrying a police scanner. RP 108-10. That was error. It is well established that possessing a police scanner is not illegal and in fact has become commonplace for a variety of reasons having nothing to do with criminal intent. *State v. Zimmer*, 146 Wn. App. 405, 414, 190 P.3d 121 (2008). Officer Sawyer testified that many law-

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abiding citizens possess scanners for purposes other than delivering drugs. RP 126. Moreover, there was no evidence that the alleged scanner was actually functional. RP 127. Therefore, it was error to overrule Villarreal's relevancy objection. RP 110. The prosecutor wisely did not mention the scanner as corroborative evidence in closing argument.

The prosecutor also made much of the fact that Villarreal was carrying $1,700 in cash. Interestingly, the State did not offer this for its logical evidentiary significance as tending to prove recent sales of drugs. Instead, the prosecutor argued that the cash tended to prove a recent significant drug purchase. RP 229. First, this makes no sense, and second, it is irrelevant. A lot of cash is suggestive of sales, not purchases. The State did not present any evidence that the drugs in the Mr. Villarreal's bag were prepared or packaged for sale. Moreover, the State did not refute testimony that Villarreal made his living in the cash economy outside regular employment channels. So carrying cash was simply not probative of criminality. RP 186.

As a matter of law, insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). That is the correct disposition in this case.

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7. VILLARREAL WAS PREJUDICED BY IRRELEVANT EXPERT TESTIMONY ABOUT THE PRACTICES OF METH DISTRIBUTORS.

A key witness for the State was Longview Police Officer Timothy J. Watson. RP 149. Defense counsel objected to Watson's testimony on relevance grounds, because Watson claimed no personal knowledge regarding anything to do with this case. RP 143. The court ruled that Watson could testify as an expert. RP 147. This was error.

A trial courts evidentiary rulings are reviewed for abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Discretion is abused when the trial court exercises its discretion in a manner that is manifestly unreasonable or not based on tenable grounds. *Id.* Regarding expert witnesses, ER 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Villarreal did not challenge Detective Watson's credentials. RP 149-51. But Watson's testimony was not relevant either to explain any fact in evidence or to determine any fact at issue.

When reviewing a relevancy challenge to testimony admitted under ER 702, the sole question is whether the witness's testimony can be

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characterized as helpful to the trier of fact (a) to understand the evidence or (b) to determine a fact in issue. *State v. Farr–Lenzini*, 93 Wn. App. 453, 460, 970 P.2d 313 (1999), *review denied*, 145 Wn.2d 1004, 35 P.3d 381 (2001).

Watson testified at length on the habits of street-level drug dealers. RP 149–165. The jury learned what happens in a "controlled buy," RP 154; how methamphetamine is manufactured, RP156; ingested, RP 157; imported from Mexico, RP 156; packaged in smaller quantities for sale, RP 158. Watson testified about street "lingo" for the various purchase amounts, RP 159-61; representative prices, RP 160-61; how users are cheated by unscrupulous practices such as "shorting" the quantity or "cutting" the product with filler. RP 162-64.

But the State introduced absolutely no evidence that Villarreal had been involved in a controlled buy, or that he had ever manufactured, imported, packaged or distributed methamphetamine. Villarreal did testify that he ingested it, but he told the jury himself how he did it. Accordingly, immersing the jury in the minutiae of the practices Watson described was both irrelevant and prejudicial. It created a complete and vivid mental image in the minds of the jurors of the methamphetamine distribution chain. It is highly probable that one or more jurors associated this "evidence" with the defendant.

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Moreover, Watson's testimony invaded the province of the jury. It is the exclusive responsibility of the jury to determine guilt or innocence. No witness, even an expert, may express an opinion that suggests, even indirectly by inference, that the defendant is guilty. *State v. Farr-Lenzini*, 93 Wn. App. 453, 459-460, 970 P.2d 313 (1999). To do so encroaches on the jury's independent determination of the facts and violate the defendant's constitutional right. *Id.*, citing *State v. Carlin*, 40 Wn. App. 698, 701, 700 P.2d 323 (1985). Most crucial to the facts before this Court, "the closer the tie between an opinion and the ultimate issue of fact, the stronger the supporting factual basis must be." *Farr-Lenzini*, 93 Wn. App. at 460, quoting 1 John William Strong et al., MCCORMACK ON EVIDENCE § 12 (4th ed.1992).

In *Farr-Lenzini*, opinion testimony was properly admitted to explain "complex or arcane medical, psychological or technical evidence[.]" *Farr-Lenzini*, 93 Wn. App. at 462. Here, by contrast Watson's opinion testimony was the arcane, complex and technical evidence. The only factual evidence offered during Mr. Villarreal's trial were simple claims regarding his location, that he had methamphetamine in his possession, and whether he was in possession of other items that proved beyond a reasonable doubt that he intended to divide, package, and distribute methamphetamine for sale.

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Where, as here, "a lay jury, relying upon its common experience and without the aid of an expert, is capable of deciding" the essential disputed facts, then expert testimony is not properly admissible under ER 702. *Farr-Lenzini*, 93 Wn. App. at 462.

The State made no claim that Det. Watson's testimony applied to any fact in evidence. Thus, Watson's testimony could only mislead the jury about the difference between evidence and accusations.

Reversal is required.

8. THE SCHOOL ZONE STATUTE IS UNCONSTITUTIONAL AS APPLIED.

The Court should not endorse applying RCW 69.50.435(d) to these facts, because to do so invites abuse.

This Court's purpose in interpreting a statute is to determine and carry out the intent of the legislature. *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 7046 (2010). The legislative purpose in enacting RCW 69.50.435(d) is to keep drug dealers away from school children, and to keep drug transactions out of school zones. *State v. Coria*, 120 Wn. 2d 156, 169, 839 P.2d 890 (1992). But enhancing the penalty must make sense under the particular circumstances. *Id.*

For example, applying a similar federal law to drug offenders on a train stopped at a station that was near a school was "overreaching." *U.S.*

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v. Coates, 739 F. Supp. 146, 153 (S.D.N.Y., 1990) (interpreting 21 U.S.C. § 845a, and cited in *Coria*, 120 Wn.2d at 165.) "To charge a schoolyard count in these circumstances stretches the scope of the statute beyond logical and acceptable bounds." *Coates*, 739 F. Supp. at 153. The school zone enhancement was unconstitutional as applied to the *Coates* defendants because they had obviously merely been passing through the school zone with no intent or ability to endanger children.

Villarreal was on foot, not on a train, but the same principle applies. There was no suspicion, let alone evidence, that the school zone was a destination volitionally chosen by Villarreal; nor did they voluntarily stop there. It was 2:00 in the morning, so no school children were at risk.

Moreover, allowing the State to increase the punishment for an offense on the sole basis of the particular location the police arbitrarily select to stop and search a pedestrian gives the police unfettered discretion to double the potential penalty of an offense merely by arbitrarily postponing an investigative stop until the suspect enters a protected zone. This is not what the Legislature intended.

Specifically, where, as here, a citizen is subjected to an arbitrary seizure and search without the protection of a warrant issued upon probable cause by a neutral magistrate, there is a danger that police power

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will be abused. *State v. Young*, 123 Wn.2d 173, 187, 867 P.2d 593 (1994), citing David E. Steinberg. MAKING SENSE OF SENSE-ENHANCED SEARCHES, 74 Minn. L. Rev. 563, 569 (1990). In such circumstances, we rely on our courts to interpret statutes so as to avoid encouraging "arbitrary and inappropriate police conduct." *Id.*

Here, Officer Sawyer seized and searched Mr. Villarreal without any lawful authority and with complete disregard of his constitutional protections against unreasonable searches. Officer Sawyer's actions were arbitrary and lawless in every respect.

The Court should strike the school zone enhancement.

9. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT BY MISLEADING THE JURY AS TO THE PRESUMPTION OF INNOCENCE.

Prosecutorial misconduct may deprive a defendant of a fair trial. *See State v. Jones*, 144 Wn. App. 284, 290, 183 P.3d 307 (2008). To establish misconduct, the defendant must show both improper comments and resulting prejudice. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). This Court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546(1997)..

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Where, as here, defense counsel does not object, the conduct must be "flagrant and ill-intentioned" such as to evince an "enduring prejudice" the trial court could not have cured by an instruction. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). Misleading the jury about the nature of its essential role as fact-finder constitutes misconduct that can be raised for the first time on appeal and entitles the appellant to relief.

Specifically, comments that erode the presumption of innocence constitute reversible misconduct. *State v. Venegas*, 155 Wn. App. 507, 524, 228 P.3d 813, *review denied*, 170 Wn.2d 1003, 245 P.3d 226 (2010). The presumption of innocence is the "bedrock upon which the criminal justice system stands." *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007).

Here, the prosecutor repeated numerous times that if it looks like a duck and quacks like a duck, it is a duck. RP 202, 229, 230. This eroded the presumption of innocence. The jury's job is not to determine guilt or innocence by identifying a couple of characteristics the defendant shares with the archetypical offender. Rather it is to ask whether the State has or has not proved every element of the charged crime beyond a reasonable doubt.

The prejudicial effect of Detective Watson's testimony is clear in relation to the "quacks like a duck" theme hammered upon by the

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prosecutor. Watson detailed the characteristics of methamphetamine distributors. Then the prosecutor argued that, because Villarreal shared a couple of those characteristics, namely a month's supply of substance and cash, the jury could presume he was a distributor. Repeating this logical fallacy (by which the O.S.U. mascot must be an actual duck) was not helpful to the jury. It could only confuse them about how to apply the presumption of innocence.

Further, the prosecutor repeatedly suggested that Villarreal had not proved his innocence. For example, that he failed to show that he did not intend to sell the 30 grams for a huge profit, RP 209; that the quantity alone was proof of intent to sell, RP 210, 230; that an innocent person would have remembered more details about the day of his arrest, RP 224; that his testimony was inconsistent with Watson's, RP 225, 227;

The prosecutor's remarks were extremely misleading for a lay person unfamiliar with the concept of the presumption of innocence and with the nuances of legal argument. The prosecutor obscured the simple fact that the State failed to produce sufficient evidence to prove beyond a reasonable doubt that Mr. Villarreal intended to sell drugs.

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VI. CONCLUSION

For the foregoing reasons, the Court should reverse Jesus Villarreal's conviction, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

Respectfully submitted, this 31st day of October, 2011.

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CERTIFICATE OF SERVICE

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